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In the

SUPREME COURT OF THE

UNITED STATES

October term, 1967

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No. 1253

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HANS KRAMM,

Petitioner,

v.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California.

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PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

==========

Charles K. Hackler
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Brundage, Hackler, Williams
& Zellmann
1750 Sixth Avenue
San Diego, California

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MOTION FOR LEAVE TO

FILE TYPEWRITTEN PETITION FOR CERTIORARI

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Petitioner moves this Honorable Court for leave to file a typewritten brief due to the fact that the potential recovery in the workmen's compensation proceedings would not support attorneys' fees and the cost of printing the petition and the brief, should the writ be granted.

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Petitioner further moves this Court for a waiver of rule 47 since the petition herein had been substantially completed before the various loose-leaf services made the amended rule of Court available to petitioner.

Respectfully submitted,

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of California, entered in the above-entitled case on November 22, 1967.

OPINIONS BELOW

The decision of Honorable Referee, California Workmen's Compensation Appeals Board which is unreported is printed as Appendix "B", hereto.

The decision of the California Workmen's Compensation Appeals Board which is unreported, is printed as Appendix "C", hereto.

The Court of Appeal, Fourth Appellate District, State of California, Division, did not render an opinion; its judgment denied a Petition for a Writ of Review; the judgment is unreported and is printed as Appendix "D", hereto.

The Supreme Court of the State of California did not render an opinion; its decision denied a Petition for Hearing on Appeal from the District Court of Appeal's refusal to issue a Writ of Review; the judgment is unreported and is printed as Appendix "E", hereto.

JURISDICTION

The judgment of the Supreme Court of the State of California was entered November 22, 1967.

Upon Petitioner's request, Justice William O. Douglas granted an extension of time to file the Petition until March 22, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) since Petitioner has been deprived of his property witnout the due process of law required by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a State may replace a

Courts would not have had jurisdiction to answer.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner urges the following reasons why the Petition for Writ of Certiorari should be granted in this case:

Important and substantial issues of Federal Constitutional Law are here presented, involving a state's ability to establish, maintain and operate a system which denies an injured employee his common law property right to bring an action and at the same time precludes judicial review of this administrative process.

Petitioner submits that the State of California, in so implementing the provisions of its Workmen's Compensation Act, California Labor Code § 3201 et sequitur, has abridged his property rights without due process of law, contrary to the Fourteenth Amendment and in conflict with controlling principles established by this Court.

The absence of a record of the proceedings before the referee and before the Workmen's Compensation Appeals Board upon which to base an appeal is demonstrative of the denial of due process in this administrative proceeding. The Court has acknowledged the importance of an adequate record as a basis for appeal and the same standards must be applied in proceedings to obtain judicial review.

In Griffin v. Illinois, 351 U.S. 12 (1956) the

common-law cause of action with an administrative hearing in which the procedure for fact-finding determinations by a referee effectively precludes judicial review?

2. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a fact-finding referee may deny relief for workmen's injuries where such action is based on conclusions contrary to all of the evidence presented?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the United States Constitution, Amendment XIV, Section 1.

The Statutory provisions involved are:

1. Section 1257 of title 28, United States Code.

2. Cal. Lab. Code §§ 3202, 3601, 5400, 5902, 5907, 5950, 5951, and 5952.

3. Cal. Civ. Proc. Code §§ 1068, 1069, 1070, 1071, 1074.

These sections are set forth as Appendix "A" hereto.

STATEMENT OF THE CASE

Since, under the appropriate California Law, there is no official record at this stage of the review proceedings, the statement of facts is a synthesis of the statement in Petitioner's Petition for Writ of Review and

that in Respondent, Hartford Accident & Indemnity Company's Answering Brief.

On August 26, 1965, Petitioner, a bricklayer, was employed by Respondent Straightline Masonry Company. He was injured that day as he performed his duties. He felt a slight amount of pain immediately but the pain subsided so he continued to work (Pet. 3, Ans. 2).

Petitioner continued to work for Straightline and other employers for approximately four months. Each day the pain grew worse, though an evening's rest provided a brief respite (Pet. 3, Ans. 3).

In January of 1966, Petitioner saw Dr. Kimball for his injury. Subsequently, Petitioner saw a succession of Medical Doctors and Chiropractors. On June 23, 1966, Petitioner was examined by De Sales DuVigneaud, discovered the need for immediate surgery and on June 27, 1966, the doctor performed a laminectomy at both L-4 and L-5 levels. Protruding nuclear material was removed from the herniated L-4 disc (Pet. 3-4, Ans. 6-7).

On July 19, 1966, Petitioner filed an application for benefits with the Industrial Accident Commission. On August 4, 1966, Respondent Hartford Accident and Indemnity Company filed its answer. A hearing was held on this application on December 14, 1966 (Pet. 4).

Subsequent to additional surgery, applicant was examined by Dr. Howell G. Wiggins and Dr. David G. Freeman

at the request of Respondent's insurance company. A supplemental hearing was held on February 14, 1967 (Pet. 5, Ans. 7).

On April 22, 1967, Findings & Award were issued by the Referee (Appendix "B"). The Findings & Award held that the applicant had sustained an industrial injury but refused to find that Petitioner's physical condition was a result of the injury.

Petitioner then timely petitioned the Workmen's Compensation Appeals Board for reconsideration. Based on the Referee's summary of testimony (not a formal record or transcript) and the Referee's recommended opinion, the Workmen's Compensation Appeals Board denied the petition for reconsideration. The decision is attached as Appendix "C".

The Petitioner then filed a Petition for Writ of Review in the Court of Appeal of the State of California, in and for the Fourth Appellate District, Division 1. The issuance of this prerogative writ would have authorized the preparation of an official record for review by that Court. The Court of Appeal denied the writ without opinion. A copy of the denial is attached hereto as Appendix "D".

Petitioner timely petitioned the Supreme Court of the State of California for a hearing on the refusal to issue the Writ of Review. On November 22, 1967, the Supreme Court of the State of California denied the petition without opinion. A copy of the denial is attached hereto as Appendix "E

In the instant matter it was inappropriate under California Procedural Statutes to raise the federal question prior to petitioning the Supreme Court for a Writ of Certiorari. California Labor Code Section 5952 entitled "Scope of Review; Limitation" specifies that review shall be limited to a determination whether:

"(a) the commission acted without and in excess of its powers.

(b) the order, decision, or award was procured by fraud.

(c) the order, decision, or award was unreasonable.

(d) the order, decision, or award was not supported by substantial evidence.

(e) if findings of fact are made, such findings of fact support the order, decision, or award reviewed."

The District Court of Appeal is thereby precluded from reviewing any federal question presented and as a result, it is inappropriate to raise a federal question at that point in time. The appropriate means for reviewing a refusal to issue a writ is by a petition for hearing. Linstead vs. Superior Court, 7 C.2d 347, 60 P.2d 280 (1936).

Under California Appeallate Procedure, Rule 20 of the Rules on Appeal and Rule 29 of the same rules, a hearing in the Supreme Court after decision by District Court of Appeal will be ordered where:

"1) it appears necessary to secure uniformity of decision for the settlement of important questions of law;

2) where the District Court of Appeal was without jurisdiction of the cause; or

3) where, because of disqualification or other reason, the decision of the District Court of Appeal lacks the concurrence of the required majority of qualified justices."

It was inappropriate for Petitioner to raise a federal question at this stage of the proceedings because both by Rule 29 of the Rules on Appeal and also by the fact that until the Supreme Court denied hearing, there had been no denial of due process. Until that time, it was within the Supreme Court's jurisdiction to reverse the Fourth District Court of Appeal's holding. The Court could thus have directed the District Court of Appeal to order the preparation and certification of the official record (without a transcript of proceedings) and to review the record as certified for error. Thus, as long as the Petitioner had adequate opportunity to obtain relief and no federal right had thus far been interferred with because the Courts might still order the preparation of the complete record, the federal questions which loom so large in this matter were not appropriate until the present time. Petitioner therefore did not prematurely raise the federal questions which the California Appellate

Court took cognizance of the need of some form of objective record for adequate and effective appellate review in striking down an Illinois procedure which effectively prevented indigent defendants from obtaining review because they could not afford a transcript.

In Draper v. Washington, 372 U.S. 487 (1963) this Court again re-affirmed its position that review must be based on a sufficiently complete record. The Court in Draper held that a mere summary of trial proceedings was not such a complete record for purposes of appellate review.

Thus the importance of sufficiently complete records has been recognized by this Court in criminal matters. Such records are equally as necessary for adequate review in civil matters. Courts have recognized this need also.

In Green v. McElroy, 360 U.S. 474, 508 (1956) the Court made it clear that judicial review of an administrative proceeding may not be barred by rules of the administrative body which abort either administrative or judicial review.

In the instant matter it is clear that Workmen's Compensation Appeals Board has aborted both administrative and judicial review.

In Leeds and Northrup Co. v. NLRB, 357 F.2d 527 (3rd Cir. 1966), the Court emphasized the need for an evidentury hearing. Implicit in such a holding is recognition of the fact that such a hearing is valueless unless

preserved. As the Court stated in NLRB v. Southern Transport, Inc. 355 F.2d 978 (8th Cir. 1966):

> "Recognizing this is by nature an adversary business, we cannot expect accurate reflections of 'what was said' to come from the mouths of the participants whose memories as all memories, are subject to the erosion of time and the discoloration of economic and personal self interest . . . 'What is said' can accurately be preserved only by recording it, as it is said, by a person or machine detached from the ultimate outcome.
>
> "Furthermore, when by prior adjudication a respondent's factual analysis has been rejected as not being an accurate reflection of the truth, and it feels its analysis is justified, it should be free to seek in good faith a record which will disclose whether or not it was correct in its evaluation. Future rights . . . need not be left to the chance of faulty, mistaken or inaccurate testimony."

While this statement was made with respect to an informal proceeding, it is more emphatically true in a proceeding which permanently determines the rights of the parties. The referee, while theoretically neutral during the hearing before him, is aware that in subsequent proceedings his conclusions will be attacked. Thus, though presumably neutral in the hearing, the referee is partisan in subsequent pro-

ceedings to reverse his findings. Naturally, the referee's summary of testimony will support his conclusions which are under attack. Precisely this element of personal self-interest to which the Court refers as an influence which discolors memory and necessitates an objective recording or the proceedings.

It is as necessary to guard against this form of bias as against any other. To deny one seeking judicial review of an administrative action such a necessary tool is to deprive him of a property right without due process. Yet, the procedures in California governing review of Workmen's Compensation cases provide no record before the Court of Appeal and no record before any subsequent court of appeal if the writ of review is denied.

After a Referee's decision, the applicant has twenty (20) days to file a Petition for Reconsideration with the Workmen's Compensation Appeals Board pursuant to Cal. Lab. Code § 5902. This section requires the moving party to set forth any matter he relies upon but makes no provisions for the preparation of an official record.

Section 5907 of the California Labor Code governs commission proceedings on the Petition for Reconsideration. It also omits any mention of the preparation of an official record.

Section 5950 of the California Labor Code and Section 1069 of the California Code of Civil Procedure

provide for an Application for Writ of Review. The cases under both of these sections as well as under Section 1068 of the California Code of Civil Procedure establish that the issuance of the Writ is entirely within the discretion of the court to which application has been made.

Keys v. Maric County, 42 C 252 (1871).

With prerogative writs such as writs of review, a Court which had an overburdened calendar, as does the Court of Appeal for the Fourth District, can exercise its discretion to summarily deny all special writs. Thus judicial review can be denied by the length of the court's calendar.

Section 5951 of the California Labor Code and Section 1070 and 1071 of the California Code of Civil Procedure establish that the writ is directed to a lower tribunal to certify the record below to the court within a given period. Thus, in passing on the writ in the exercise of its discretion, (without the benefit of the record) an initial reviewing court can bar the preparation of a record for a further review. The combined operation of the Labor Code and Code of Civil Procedure thus foreclose any judicial review.

The Courts of this Country have long recognized that the right to bring an action is a property right within the meaning of the Due Process Clause of the Fourteenth Amendment. Lamb v. Powder River Live Stock Co., 132 F.2d

434 (10 Cir., 1904).

Terracioma v. Magee, 53 N.J. Super. 557, 148 A.2d 68 (1959).

Prohrlack v. Goff, 197 F. Suff. 670 (D.C. D.C., 1961).

California Labor Code § 3202 and cases thereunder, make it clear that the employees' only remedy for industrial injuries is through the Workmen's Compensation Act. It is clear that the Workmen's Compensation Action is a replacement for the common law rights the employee had against his employer.

Alaska Packers Assn. v. I.A.C., 200 Cal. 579, 253 P. 926, aff'd 276 U.S. 467.

While the substitution of an administrative remedy for the right to file a suit has been held not to be deprivation of property without due process of law, such holdings are contingent upon the availability of judicial review.

Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915).

Petitioner has been deprived of his property right to file an action in exchange for an arbitrary and capricious administrative proceeding which denies him judicial review.

The existing procedures of the California workmen's compensation statues, as applied, afford only a

meaningless formalism in lieu of genuine judicial scrutiny. The referee's decision -- ostensibly that of a "fact-finder" -- is, as demonstrated by the instant case, the ultimate decision.

The theory of the statute is that the petitioner is protected against arbitrary, unjust and biased action of the referee by review in three stages: first, by the Workmen's Compensation Appeals Board; second, by extraordinary writ to the California Court of Appeals; and third, by petition to the California Supreme Court.

That is the theory. The fact is, that the Appeals Board "reviews" the referee's decision for arbitrariness or bias against the summary minutes of the referee himself--certainly not the best way to safeguard against such actions--while the courts (assuming they are disposed to consider extraordinary writs) don't have even that record upon which to base a determination. Under such circumstances, review of an arbitrary or biased determination of a referee is a travesty which cannot be considered judicial review under the law.

The Workmen's Compensation Appeals Board is well aware of this condition. The Workmen's Compensation Board of Appeal's belief in the non-reviewability of a decision which they have refused to review is best indicated by the brief of the Workmen's Compensation Appeals Board submitted in the District Court of Appeal and then resubmitted

inaccuracy of the Workmen's Compensation Appeals Board's statement that petitioner first sought medical advise in November of 1966. In addition, it is clear from both respondent, Hartford Accident & Indemnity Co. and Petitioner's briefs and the exhibits thereto that Petitioner underwent surgery on June of 1966 some five (5) months in advance of the date which the Board states the Petitioner first sought medical advice.

Again, page 6 of the Respondent Hartford Accident & Indemnity Co.'s brief makes it clear that Petitioner saw his own doctor, Dr. Kimball, first and only subsequently did he see Dr. Gaye, a chiropractor. Again the Workmen's Compensation Appeals Board has misconstrued the facts in its brief.

The Board in its brief also states:

"Petitioner's attempt to associate his subsequent medical problems and expenses to the said incident was by means of the testimony of his doctors."

In fact, two of the three medical reports, those of Drs. Howell G. Wiggins and David Freeman were reports submitted at the request of respondent Hartford Accident & Indemnity Insurance Co. and not from doctors seen by the Petitioner at his own behest.

In the section labeled "ARGUMENT", the Workmen's Compensation Appeals Board again misconstrues the facts. It is stated therein "it was not until November 22, 1966, that

he had reached the stage where he 'was having excruciating distress' and underwent 'another laminectomy and a spinal fusion." What the Workmen's Compensation Appeals Board's brief overlooks is the fact that in June of 1966, Petitioner had undergone an initial laminectomy and that he was again having excruciating distress in November necessitating a second laminectomy.

Such egregious factual errors as these clearly indicate the Board's security in its feeling that it will not be reviewed no matter how deserving of a review a particular decision might be. Such a statement of facts also graphically illustrates the need for a complete objective record before a reviewing body to insure a proper presentation of the case.

There are several rules being applied today in judicial review of administrative proceedings to determine whether there is sufficient evidence to support the decision of the agency.

The first rule is known as the "residuum rule." The residuum rule requires that there be some scrap of legal evidence to support the agency decision. Carrol v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916).

The second rule is that any evidence will support the agency's determination. First National Bank of Milwaukee v. Industrial Commission, 161 Wis. 526, 154 N.W. 847

The third rule is that the decision must be supported by substantial evidence when the record is taken as a whole. Cal. Lab. Code § 5951 (e). Phoenix Indemnity Co. v. I.A.C., 31C 2d 856 (1948). Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

It is this last rule upon which petitioner bases his allegation that he has been deprived of his property without due process of law.

A review of the unofficial record in this case reveals a bootstrap operation by the Referee. There are three medical reports relating to Petitioner's permanent disability. Two of the three reports are from doctors whom Petitioner visited at Respondent Hartford Accident & Indemnity Co.'s request. While the reports vary in degrees of certainty, even the report most damaging to Petitioner establishes that his present condition is a result of the injury. The report states that if the Board finds an industrial injury in August of 1965, then the applicant's present condition is a result of this injury. Yet, the Referee disregarded all three medical reports and Petitioner's own testimony by refusing to find causation after having found an industrial injury in August of 1965.

Instead the Referee engaged in an unconscionable surmise to reach conclusions wholly unsupported by the evidence before him. No reason can be found to justify such unorthodox conduct. There was no conflict in the

evidence which in any way permitted the fact-finder's resort to conjecture which contradicted otherwise uncontroverted facts.

Determinations based purely on surmise are unreasonable, arbitrary and capricious within the meaning of the standards established by the Court in the following cases:

NLRB v. Columbian Enameling & Stamping Company, 306 U.S. 292 (1939).

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

NLRB v. Pittsburgh Steamship Company, 340 U.S. 498 (1951).

Dickinson v. United States, 346 U.S. 389 (1953).

Morris v. Alabama, 294 U.S. 587 (1935).

Petitioner has been deprived of his property without due process of law since the fact finder in this matter has reached a decision based purely on his own surmise, controverted by the evidence, and judicial review of this unconscionable decision has been wholly denied.

Petitioner fully complied with all of the procedures for full judicial review, to no avail. Petitioner is now forced to come before this court in an effort to obtain judicial review to regain the property rights he has been unlawfully deprived of.

CONCLUSION

This Court has recognized the importance of the workingman's remedy under the workmen's compensation laws adopted by all of the States, and has ruled that such rights may not be abridged under the guise of countervailing state policy. United Mine Workers v. State Bar of Illinois, ____ U.S. _____, 88 S. Ct. 353 (1967); Nash v. Florida Industrial Commission, et al., 389 U.S. 235, (1967).

In the instant case, no countervailing State policy can be urged to justify a State procedure which unconstitutionally denies property rights and due process of law by taking away Petitioner's common law rights to sue and substituting therefore the arbitrary, capricious and unfair determination of a fact finder whose decision is not subject to judicial review.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1257(3), Title 28, United States Code (1956):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . . ."

California Labor Code:

"§3202. Same: Construction. The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending

their benefits for the protection of persons injured in the course of their employment."

"§3601. Exclusive remedy: Action for damages. (a) Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment. . . ."

"§5400. Notice of injury: Service prerequisite to claim: Time: Signing. Except as provided by sections 5402 and 5403, no claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured or someone in his behalf, or in case of the death of the person injured, by a dependent or someone in the dependent's behalf."

"§5902. Same: Specification of grounds and issues: Verification: Statement of evidence, etc., relied on. The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by a commissioner or a referee to be un-

just or unlawful, and every issue to be considered by the commission. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof."

"§5907. Same: Without further proceedings and hearing where no further testimony necessary. If at the time of granting reconsideration, it appears to the satisfaction of the commission that no sufficient reason exists for taking further testimony, the commission may affirm, rescind, alter or amend the order, decision, or award made and filed by a commissioner or referee and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case."

"§5950. Application for writ of review: Time For: Purpose. Any person affected by an order, decision, or award of the commission may, within the time limit specified in this section, apply to the Supreme Court or to the district court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award following reconsideration. The application for writ of review

must be made within 30 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the commission's own motion, within 30 days after the filing of the order, decision, or award following reconsideration."

"§5951. Return of writ: Time and place: Direction to certify record: New or additional evidence. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the commission, as certified to by it."

"§5952. Scope of review: Limitation. The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the commission, whether:

(a) The commission acted without or in excess of its powers.

(b) The order, decision, or award was procured by fraud.

(c) The order, decision, or award was unreasonable.

(d) The order, decision, or award was not supported by substantial evidence.

(e) If findings of fact are made, such findings of fact support the order, decision, or award review.

Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

California Civil Procedure Code:

"§1068. [When and by what courts granted.] A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

"§1069. [Application for writ: How made.] The application must be made on the verified petition of the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice."

"§1070. The writ to be directed to the inferior tribunal, etc. The writ may be directed to the inferior tribunal, board, or officer, or to any other person

having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required."

"§1071. Contents of the writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed."

"§1074. The review under the writ, extent of. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

APPENDIX "B"

WORKMEN'S COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HANS KRAMM, Applicant, vs. STRAIGHT-LINE MASONRY COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY, Defendants.	CASE NO. 66 SD 17023 FINDINGS AND AWARD AND ORDER DISALLOWING LIEN CLAIMS

Brundage, Hackler & Williams, by Donald Zellman, attorneys for applicant
Schall, Nielsen & Boudreau, by Sidney Stutz, attorneys for defendants

Application having been filed herein; all parties having appeared, and the matter having been regularly submitted for decision, the Honorable Jerome Waxler, Referee, makes his Findings and Award and Order as follows:

FINDINGS OF FACT

1. Hans Kramm, born September 10, 1922, did at San Diego, California, on August, 26, 1965, sustain an injury to his right leg and low back, arising out of and in the course of his employment, as a bricklayer, by Straight-Line Masonry Company, then insured by Hartford Accident & Indemnity Company.

2. Applicant's earnings were then maximum.

3. This injury caused no compensable temporary

disability.

4. This injury caused no residual permanent disability.

5. Applicant is entitled to be reimbursed for medical-legal expense reasonably and necessarily incurred to prove his contested claim in the sum of $185.00, payable to Foothills Orthopedic Medical Group, lien claimant.

6. Defendants are not liable for any self-procured medical treatment.

7. There is no basis for apportionment of any of the benefits awarded herein.

8. Applicant is not in need of further medical treatment to cure or relieve from the effects of this injury.

9. Applicant is not entitled to be reimbursed for reasonable medical transportation expense.

10. Defendants were not prejudiced by lack of notice.

11. The lien claims of Grossmont Hospital, Dr. Tim V. Richey, Department of Employment, Dr. Graham Judson, El Cajon Valley Hospital, and the balance of the lien claim of Foothills Orthopedic Medical Group shall be disallowed.

12. There are no funds available for a reasonable attorneys' fee.

/////

A W A R D

AWARD IS MADE in favor of Hans Kramm against Hartford Accident & Indemnity Company of reimbursement for medical-legal expense in the sum of $185.00, payable to Foothills Orthopedic Medical Group, lien claimant.

O R D E R

IT IS ORDERED that the lien claims of Grossmont Hospital, Dr. Tim V. Richey, Department of Employment, Dr. Graham Judson, El Cajon Valley Hospital, and the balance of the lien claim of Foothills Orthopedic Medical Group be and they are hereby disallowed.

JEROME WAXLER
Referee
WORKMEN'S COMPENSATION APPEALS BOARD

(SEAL)
JW:ec
66 SD 17023
4.27
FILED:
SERVED:
All parties served as shown
on Official Addr ss Record

APPENDIX "C"

WORKMEN'S COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HANS KRAMM, Applicant, vs. STRAIGHT-LINE MASONRY COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, Defendants.	CASE NO. 66 SD 17023 ORDER DENYING RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration on file herein and the contents of the Referee's Report with respect thereto. Based on our review of the record, and for the reasons stated by the Referee, whose report we herewith adopt and incorporate.

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, DENIED.

WORKMEN'S COMPENSATION APPEALS BOARD

Morton R. Colvin

I concur.

George A. Jackson

Charles W. Decker, Deputy

Dated and filed at San Francisco, California June 14, 1967

Service by mail on said date on all parties as shown on Official Address Record

(SEAL)

APPENDIX "D"

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FOURTH APPELLATE DISTRICT

DIVISION ONE

HANS KRAMM vs. WORKMEN'S COMPENSATION APPEALS BOARD, ETC., ET AL	4 Civil No. 8825

BY THE COURT:

The Petition for Writ of Review is denied.

Dated: October 26, 1967
cc: Brundage, Hackler & Williams-SD
Sidney A. Stutz & Schall, Nielsen & Boudreau-SD
W.C.A.B.-LA & SF

BROWN, P.J.

APPENDIX "E"

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

==========

November 22, 1967

==========

Dear Sir: I have this day filed Order...Hearing Denied

In Re: 4 Civ. No. 8825
KRAMM

vs.

WORKMEN'S COMPENSATION APPEALS BOARD

Respectfully,

WILLIAM I. SULLIVAN
Clerk

In the

SUPREME COURT OF THE

UNITED STATES

October term, 1967

==========

No. ___

==========

HANS KRAMM,

Petitioner,

v.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California.

==========

AFFIDAVIT OF SERVICE BY MAIL

==========

State of California,)
)-ss.
County of San Diego.)

Linda Kay Marsh, being first duly sworn, deposes and says:

That she is a clerk-stenographer in the office of Brundage, Hackler, Williams & Zellmann, attorneys, at 1750 Sixth Avenue, San Diego, California; that on March 20, 1968, she served the attached Petition for a Writ of Certiorari by placing a copy thereof in an envelope, with airmail postage fully pre-paid, properly addressed to them as follows:

Mr. Sidney Stutz
Schall, Nielsen & Boudreau
1700 U.S. National Bank Bldg.
San Diego, California 92101

Mr. William Sullivan
Clerk Office of the Supreme Court
of the State of California
4250 State Bldg.
San Francisco, California 94102

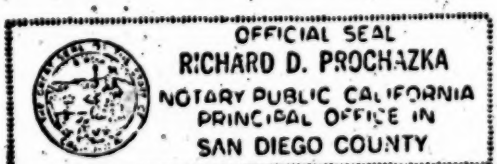
Mr. Edward A. Sarkisian
Workmen's Compensation Appeals Board
455 Golden Gate Avenue
Room 2154
San Francisco, California 94102

These addresses are the last known addresses known to her, and the envelopes were deposited by her in the United States Post Office at San Diego, California, postage pre-paid.

Linda Kay Marsh

Subscribed and sworn
to before me this 20th
day of March, 1968.

Richard D Prochazka



My Commission Expires July 17, 1971

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UPREME COURT, U. S.

FILED
APR 12 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1253

HANS KRAMM,
Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,
Respondents.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

EVERETT A. CORTEN,
107 South Broadway,
Los Angeles, Calif. 90012,
Attorney for Respondent Workmen's Compensation Appeals Board of the State of California.

NATHAN MUDGE,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

HANS KRAMM,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,

Respondents.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Respondent, Workmen's Compensation Appeals Board of the State of California, respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner, Hans Kramm.

Opinions Below.

On June 14, 1967, the Respondent Appeals Board issued its Order Denying Reconsideration (petitioner's Appendix "C") of its referee's findings (petitioner's Appendix "B"), thereby affirming the determination that petitioner's industrial injury caused no compensable disability.

Petitioner then timely filed a Petition for Writ of Review in the Court of Appeal, Fourth Appellate District, State of California, which was denied without opinion on October 26, 1967 (petitioner's Appendix "D"). He next filed a Petition for Hearing in the Supreme Court of the State of California which was denied without opinion on November 22, 1967 (petitioner's Appendix "E").

Jurisdiction.

The jurisdiction of this Court is invoked under 28 United States Code Section 1257(3).

Petitioner now asserts, for the first time, that the procedures established by the California Legislature for the adjudication, reconsideration and review of workmen's compensation cases have denied him the due process of law guaranteed in the United States Constitution, Amendment XIV, Section 1. He further urges, for the first time, that a denial of due process issue was presented by his contention below that the evidence in the record does not support the findings of fact.

It is the respondent Appeals Board's position that the courts of the State of California have correctly applied the controlling statutes and case law, which provide procedural due process and are not in conflict with the Constitution or laws of the United States. It is respectfully submitted that no Federal question is presented or exists and that the issue was not seasonably raised.

Questions Presented.

1. Has the petitioner seasonably raised the due process issue?

2. Has the petitioner been denied due process by the California procedures for the adjudication, reconsideration, and judicial review of workmen's compensation cases?

3. Has the petitioner been denied due process by a failure of the record to support the findings of fact?

Statutes Involved.

California Labor Code provides, in pertinent part, as follows:

> "*5900.* (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a referee under any provision contained in this division, may petition the Appeals Board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. . . ."
>
> "*5906.* Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or referee on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. . . ."

"*5907.* If at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking further testimony, the appeals board may affirm, rescind, alter or amend the order, decision, or award made and filed by the appeals board or referee and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case."

"*5950.* Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the orignial order, decision, or award or of the order, decision, or award following reconsideration. . . ."

"*5951.* The writ of review shall . . . direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board, as certified to by it."

"*5952.* The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:

"(a) The appeals board acted without or in excess of its powers.

"(b) The order, decision, or award was procured by fraud.

"(c) The order, decision or award was unreasonable.

"(d) The order, decision, or award was not supported by substantial evidence.

"(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

"Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

"*5954.* The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. . . ."

California Code of Civil Procedure provides, in pertinent part, as follows:

"*1070.* Direction and Return of Writ—The Writ [of review] may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required."

"*1071.* Form and Contents.—The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ . . . a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court. . . ."

Statement of the Case.

Petitioner was employed as a bricklayer by respondent Straightline Masonry Company. He testified that on August 26, 1965, he was building a chimney when he felt pain in his right leg as he stumbled picking up a flue-liner, and in his low back as he put the flue liner into the chimney.

Petitioner suffered other industrial injuries in November, 1964, and November, 1965, which he promptly reported to his employer, but he did not mention the incident in question to his employer until the spring of 1966.

Petitioner continued working regularly, with no time off, until December, 1965, when he lost two weeks because no work was available.

He thereafter worked without interruption until June 22, 1966.

Petitioner first sought medical treatment for his back in January, 1966, when he saw a Dr. Kimball, whose records show no history of an alleged work-connected injury. Dr. Kimball reported that he was treating the petitioner for "degenerative disc L-4 with sciatica."

Back surgery was performed by a Dr. DuVigneaud who first saw the petitioner on June 23, 1966, ten months after the injury. Dr. DuVigneaud testified that his review of Dr. Kimball's records indicated a back aggravation about a week prior to January 11, 1966. Although he found nothing inconsistent with in-

dustrial injury, Dr. DuVigneaud could not unqualifiedly confirm a causal relationship between the work and the subsequent treatment, and he indicated that it was not likely that the patient would delay 4½ months before seeking medical attention.

Following the receipt of testimony at two hearings and the admission of offered evidence, the referee ordered the case submitted on February 14, 1967.

The Opinion of Referee on Decision was prepared on April 21, 1967, finding that, "The evidence supports a finding that applicant did sustain an injury arising out of and occurring in the course of his employment to his right leg and low back on August 26, 1965, that resulted in no temporary disability or residual permanent disability."

The Findings and Award (petitioner's Appendix "B") were accordingly issued by the referee on April 27, 1967.

Petitioner then petitioned the Appeals Board for Reconsideration of that decision, urging that the evidence warranted a finding of industrial disability.

The Appeals Board had before it the entire record of the proceedings held before the referee, including the evidence submitted and the referee's summaries of all testimony taken. The petitioner did not seek the reporter's transcripts of the testimony, which were available on order, nor did he object to the accuracy or completeness of the referee's summaries hereof.

On June 14, 1967, the Appeals Board filed its Order Denying Reconsideration (petitioner's Appendix "C"), affirming the referee's findings.

On July 13, 1967, the petitioner filed a Petition for Writ of Review in the Court of Appeal of the State of California, Fourth Appellate District, Division One.

Although variously stated, the petition was based upon the sole contention that there was no substantial evidence to support the Appeals Board's findings of fact, and he thereby became obligated by the requirement of *Rule 57(a)* of the California Rules of Court which provides that if on review ". . . it is claimed that the decision is not supported by substantial evidence, the petition must fairly state all the material evidence relative to the point at issue." The petitioner attached as exhibits the trial referee's summaries of testimony, the medical records of Dr. Kimball and the medical report of Dr. DuVigneaud, but petitioner neither sought transcripts of the testimony nor did he object to the contents of the referee's summaries.

Furthermore, petitioner did not file a reply brief, with the Court of Appeal, to challenge either the accuracy or the completeness of the respondent's presentation of the factual support for the Appeals Board's decision, which he had a right to do. (*Rule 57(b), Calif. Rules of Court.)*

Upon denial of the Petition for Writ of Review, the petitioner filed a Petition for Hearing in the Supreme

Court of the State of California. Therein petitioner also took the additional position that the Court of Appeal was obligated to issue the writ based upon the petitioner's allegations as to what the factual determinations should have been.

Petitioner implied that because the weight of the evidence supported his view of the facts rather than the view adopted by the Appeals Board, that to require the presentation of a more persuasive case would be a denial of due process. This argument seemed to urge that the issue before the Court of Appeal should have been whether the findings of fact were supported by the weight of the evidence rather than whether they were supported by substantial evidence.

No challenge was made to the Constitutionality of the California workmen's compensation system or to the extent of judicial review available.

On November 22, 1967, the Petition for Hearing in the California Supreme Court was denied without opinion.

ARGUMENT.

The respondent Workmen's Compensation Appeals Board of the State of California respectfully submits that the controlling California statutes and case law as applied to this case effected no violation of Constitutional requirements, and that petitioner has not seasonably raised the issue.

I.

Petitioner's Failure to Present Specifically a Substantial Federal Question in the Courts Below Bars Him From Now Invoking the Jurisdiction of This Court.

The question of the validity of state law on the ground of its being repugnant to the Federal Constitution must first be "drawn in question" before the highest court of the state in order to invoke the jurisdiction of the United States Supreme Court. (*Roller v. Murray* (1914), 234 U.S. 738, 58 L. Ed. 1570; *Wilson v. Cook* (1946), 327 U.S. 474, 90 L. Ed. 793).

Although the petitioner challenged the reasonableness of the adverse factual findings below, he has at no prior time specifically challenged the validity of the California Statutes and case law under which those determinations were made. Petitioner explains his failure to do so on the grounds that it would be inappropriate because the local statutes and rules of court do not provide for it. That position is clearly unsound. State statutes need not be enacted with built-in procedures for raising constitutional issues in order to be subject to challenge. Such a requirement would destroy the effectiveness of any judicial consideration of constitutional issues since it could be barred by simply not providing for it in the rule or statute.

Petitioner's sole reference to due process below is the following comment contained in his Argument to the Supreme Court of California (Pet. for Hear. p. 11, lines 8 to 11):

> "The question presented is whether, on this state of facts, the Applicant could, consistent with due process, have been required to carry any greater burden of proof."

It is respectfully submitted that the state high court would not thereby be apprised that its judgment, and the validity of the state's entire workmen's compensation system, were being assailed on Federal grounds, as is required. (*Wilson v. Cook, supra.*)

II.

The California Law Governing the Adjudication, Reconsideration, and Judicial Review of Workmen's Compensation Matters, as Applied in This Case, Complies With the Due Process Requirements of the Constitution and Laws of the United States.

Petitioner concedes that he was granted ample opportunity to present evidence, both documentary and in the form of testimony at the trial level. His argument is directed toward the review and appeal procedure.

Due process exists if there is opportunity to be heard at any time before final judgment. (*Wilson v. Standifer,* 184 U.S. 399, 46 L. Ed. 612). Clearly that opportunity was provided in this case. Beyond that, the complained of reconsideration and judicial review procedures were also afforded.

First, reconsideration was sought under the provisions of *California Labor Code Sections 5900 to 5911,*

which provide for filing a petition to the Appeals Board wherein the petitioner may set out at length the alleged errors of the trial referee in finding the facts or applying the law. The Appeals Board has before it the entire record of the proceedings as conducted before its referee. Either party may have transcripts of the testimony prepared and made a part of the record. The referee's summaries of the testimony are prepared and served on the parties prior to or concurrently with the decision and are a part of the record. Either party is free to object to the completeness or accuracy thereof. No such objection was made by petitioner nor did he request that transcripts be prepared, although the entire proceedings was recorded by a Hearing Reporter, with qualifications equal to a Court Reporter.

The responsibility of the Appeals Board on reconsideration has been defined by California case law as the obligation to achieve a substantial understanding of the record and this may be done by reference to the referee's summaries of the testimony when it is not claimed that the summary is in error (*Allied Comp. Ins. Co. v. Ind. Acc. Com.,* 57 Cal. 2d 115).

Following the decision of the Appeals Board, Denying Reconsideration, petitioner was in position to seek the aid of the courts.

Judicial review of the decisions of the Workmen's Compensation Appeals Board is provided for in *California Labor Code Sections 5950 to 5956,* whereby any person affected by an action of the board may apply to the Court of Appeal for a writ of review (*i.e.,* Certiorari per *Calif. Code of Civil Procedure Section 1067*).

The petitioner may present transcripts to the Court as a part of the Petition for Writ of Review. He may, and herein was obligated under *Rule 57(a)* to present all material evidence relevant to the point at issue to the Court so that it could determine if there is good cause to issue the Writ.

Petitioner sought review in due course and incorporated in his petition the referee's summaries of testimony as well as other documents and relevant evidence. He did not then or later object to the accuracy or completeness of the summaries, nor did he seek transcripts.

Since the petitioner demonstrated no reason for the Court of Appeal to believe that an error of law might have been committed, the writ was denied without opinion.

Had the Court found reason to consider the case beyond the matters presented by the briefs, and the writ issued, the Appeals Board would have been ordered to certify the entire record to the Court (*Labor Code Section 5951*), in accordance with the statutory requirement. It has been the practice of the Appeals Board, and its predecessor the Industrial Accident Commission, then to prepare and certify transcripts of all hearings, including those not previously prepared, since they may be required under the provisions of *Calif. Code of Civil Procedure Sections 1070 and 1071.*

California procedure permits further review by way of a Petition for Hearing in the California Supreme Court, which was filed in this case. The petitioner was obligated to present a fair statement of the evidence for the court's consideration, therein, as he was in the Court of Appeal (*Rule 57(a), Calif. Rules of Court*).

Since that Petition for Hearing was denied without opinion, the California Supreme Court clearly found no fault with the prior proceedings and no cause to review the matters presented to it.

The petitioner's objection below was to the findings of fact and his contention herein under the due process clause of the 5th Amendment refers to the manner in which the findings of fact were made.

Petitioner's attack upon the established California statutory method of reconsideration and judicial review of workmen's compensation cases is based upon the contention that the law precludes the Appeals Board and the courts from consideration of the entire record, including transcripts of the testimony.

As demonstrated, that basic contention is unsound, and, on the contrary, the entire record, as developed by the parties, is before the Appeals Board, and is presented to the courts in response to the writ of either court. The extent of the evidence presented in the Petition for Writ of Review or Hearing is the responsibility of the petitioner (*Rule 57(a), Calif. Rules of Court*).

The Appeals Board's review of the entire record includes the summaries of testimony prepared by the referee prior to his decision and any transcripts requested by the parties.

The court's decision whether a writ should issue is based upon the pleadings, that is, the record supplied to it by the parties. There is nothing to suggest that

either the Court of Appeal or the Supreme Court denied hearings except on the merits of the petition.

It is a common and necessary practice ". . . of the courts to determine upon the face of a pleading what action should be taken upon it." (*Napa Valley Elec. Co. v. Board of Railroad Commissioners,* 251 U.S. 366, 40 S. Ct. 174, 64 L. Ed. 310).

Since there has been due notice, proper opportunity to be heard, and the findings are based on evidence, the use of the fact-finding method here employed, is a procedure to be sustained against due process objections. (*Crowell v. Benson* (1932), 52 S. Ct. 285, 285 U.S. 22.)

The denial of the writ by the Appellate Courts is an affirmation that the board acted within its authority. The absence of an opinion by the court does not effect the quality of decision or efficacy of its judgment. (*Napa Valley Elec. Co. v. Board of Railroad Commissioners, supra*).

III.

The Record Sustains the Findings of Fact and Petitioner Has Not Been Denied Due Process by a Failure of the Evidence to Support Them.

The California statutory requirement *Labor Code Section 5952(d)* is that an order, decision, or award of the Appeals Board must be supported by substantial evidence and no judicial inquiry will be made into the weight of the evidence. The substantial evidence rule has been defined in many cases, including *Douglas*

Aircraft, Inc. v. Ind. Acc. Com. (*MacDowell*), 47 Cal. 2d 903, 905, where the California Supreme Court said:

> "When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." (Emphasis the court's.)

It appears clearly that there was substantial evidence to support the factual determination that petitioner's injury did not cause the extensive disability and need for medical treatment alleged.

The petitioner did not report this injury to his employer, although he reported others. He continued working without loss of time or medical attention. He gave no history of industrial injury to Dr. Kimball, who treated him for a degenerative disc and not an injury. Dr. DuVigneaud considered it likely that an injury occurred in January, 1966, and did not think it likely that petitioner would wait four and one-half months after an injury to seek medical treatment.

Petitioner now contends in substance, that to base the findings of fact on substantial evidence, rather than on a weight of the evidence rule, is denial of due process, even without demonstrating that the weight of the evidence is contrary.

To ask the adoption of such a rule is to ask the reviewing court to consider the probative effect of the evidence and make independent findings of fact. Due process neither requires nor contemplates that a re-

viewing court assume this task or that there exist any review procedure beyond insuring the proper application of the law. (*Crowell v. Benson, supra; Dennis v. Denver & R.R.W.R. Co.*, 84 S. Ct. 291, 375 U.S. 208, 11 L. Ed. 2d 256.)

Conclusion.

Respondent Appeals Board submits that there has been no violation of due process requirements and that petitioner has failed seasonably to present any Federal question.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EVERETT A. CORTEN,
Attorney for Respondent Workmen's Compensation Appeals Board of the State of California.

NATHAN MUDGE,
Of Counsel.

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In The Supreme Court of The United States

October Term, 1967

HANS KRAMM,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT HARTFORD ACCIDENT & INDEMNITY COMPANY, BRIEF IN OPPOSITION

SIDNEY A. STUTZ
Counsel for Respondent
Hartford Accident & Indemnity Co.
of Counsel
Schall, Nielsen & Boudreau
1700 U. S. National Bank Bldg.
San Diego, California 92101

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1 Hanna California Law of Employee Injuries & Workmen's Compensation (Second Edition) 5-60 6

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

HANS KRAMM,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFIELD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT HARTFORD ACCIDENT & INDEMNITY COMPANY, BRIEF IN OPPOSITION

ARGUMENT

I

Respondent, Hartford Accident & Indemnity Co., has set forth in detail the facts of this case in its ANSWER TO PETITION FOR WRIT OF REVIEW filed with the Court of Appeal, Fourth Appellate District, State of California, Division One. It is included in the original record of that court forwarded to the Honorable Justices of the Supreme Court of the United States March 6, 1968 in connection with the Petition for Writ of Certiorari to the Supreme Court of the State of California. Respondent, Hartford Accident & Indemnity Co., finds significant omissions in the statement of the case presented in the instant petition. However, it is believed that the factual elements of the case are irrelevant to the question now pending before the Honorable Court. It is sufficient to point out that these facts, through the earlier briefs of this respondent and the petitioner, with appendices thereto, were fully presented to the courts of the State of California, at which time they were relevant.

Complete exposition of the facts show substantial evidence to support the decision of referee below, Petitioner, having the burden of proof, failed to show a proximate relationship between the minor incident in August 1965, followed by unbroken normal activity and heavy labor for ten months, and the surgery of June 1966.

The questions presented to this Court by petitioner are so broadly phrased that they are not relatable to the issues truly involved in the case. When petitioner's brief is analyzed in full, the primary question presented appears to be whether the record of the case heard by a Workmen's Compensation Appeals Board hearing referee is sufficient to enable decision by the California Court of Appeal upon Petition for Writ of Review that is consistent with the due process clause of the Fourteenth

Amendment. Petitioner makes constant reference to the absence of a transcript and the absence of the record at the stage when the California Court of Appeal or the California Supreme Court will exercise its discretion in rejecting or accepting further limited review of Workmen's Compensation Appeals Board hearings available under the law.

Basic response that must be made to the instant petition is that:

1. There is no showing of a request by petitioner for the available transcript.

2. There is no showing by petitioner of unavailability of transcript for any reason.

3. There is no showing of prejudice to this petitioner in this case by reason of transcript of proceedings not having been prepared.

Petitioner's summary of the procedural history of review in this case is accurate as to dates, but does not reveal the record actually available to the various reviewing courts at the time of exercise of discretion.

The record of the instant case, insofar as relevant to the issues presented, was fully placed before the California courts.

The record of the District Court of Appeal, Fourth Appellate District, State of California, has been transmitted to this Honorable Court for purposes of the Petition for Writ of Certiorari. The record contains petitioner's PETITION FOR WRIT OF REVIEW, as well as this respondent's ANSWER TO PETITION FOR WRIT OF REVIEW, and the answer of respondent Workmen's Compensation Appeals Board of the State of California. The PETITION FOR WRIT OF REVIEW incorporates

as exhibits the original PETITION FOR RECONSIDERATION, dated May 15, 1967, the REPORT OF REFEREE ON PETITION FOR RECONSIDERATION, dated May 29, 1967, this respondent's ANSWER TO PETITION FOR RECONSIDERATION, dated May 29, 1967, the TRIAL REFEREE'S SUMMARIES OF THE TESTIMONY, for hearings December 6, 1966, and February 14, 1967, and the OPINION OF REFEREE ON DECISION, dated April 21, 1967. In addition, there is in petitioner's and in respondent's briefs before those courts considerable documentary evidence, including all such evidence favorable to petitioner.

Five witnesses testified in the two hearings, including petitioner Hans Kramm, his employers Mr. Lee and Mr. Kiplinger, a co-worker, Mr. Johns, and petitioner's own doctor, Doctor Du Vigneaud, who was under subpoena by this respondent. The testimony by witnesses is summarized in great detail by the referee and is included in the PETITION FOR WRIT OF REVIEW.

It is to be noted that the inaccurate factual summary inadvertently submitted by the attorneys for the Workmen's Compensation Appeals Board, referred to on pages 14 through 17 of the PETITION FOR WRIT OF CERTIORARI, did not appear in the case as the words of the original hearing referee. Any erroneous recitals that existed were apparent and made ineffectual by the accurate statements made by this respondent, the trial referee's summary of testimony, and by petitioner's own statement in the PETITION FOR WRIT OF REVIEW.

At no time in the process of review in this case has petitioner taken issue with this respondent's factual summaries, or with the referee's summary of the evidence, or in the referee's recapitulation of evidence in the referee's REPORT. In fact, petitioner included the summaries of the referee as well as the summaries of this respondent as an exhibit supporting his original PETITION FOR WRIT OF REVIEW.

At no time in the process of review in this case has petitioner suggested in specific terms that the untyped transcript, available to him as indicated hereinafter, is contrary to the factual summaries of this respondent and the referee.

Medical issues were extensively involved. The basic documentation relied upon by petitioner is in the PETITION FOR WRIT OF REVIEW as exhibits, which went to both the Court of Appeal and the Supreme Court of California. The testimony of petitioner's own treating physician was not transcribed, as it could have been upon petitioner's request, nor was it even mentioned in paraphrase by petitioner except by fleeting references.

The complete record is available to a party for presentation at all levels of review, including the time of submission for Writ of Review. Contrary to inferences which might be raised by the PETITION FOR WRIT OF CERTIORARI on page 3, lines 23 to 25, and again on page 8, lines 19 through 23, a full record by a court reporter is kept in each litigated case before a referee of the Workmen's Compensation Appeals Board. California Labor Code, §5708. This was done in the instant case.

The California Labor Code, § 5307, authorizes Rules of Practice and Procedure by the Workmen's Compensation Appeals Board. In rules issued pursuant to this authority, it is provided that the transcript, in whole or in part, is available at the request and expense of the litigant. Title 8, California Administrative Code, § 10740. California Labor Code §127(a). Such transcript, in whole or in part, may be incorporated as an exhibit by an aggrieved party petitioning for reconsideration, and time for filing will be extended to permit filing the transcript. Title 8, California Administrative Code, § 10846. The transcript is similarly available upon Petition for Writ of Review.

As recommended in a basic practice book in this field, when filing a Petition for Reconsideration, and a party determines

> ". . . the Referee's Summary of Testimony is inaccurate or insufficient, the petitioner should immediately order a transcript of testimony and allege in the petition that the panel's review of the transcript is essential to its evaluation of the case."
> California Workmen's Compensation Practice, p. 324 (California Continuing Education of the Bar.) 1963.

II

California law provides for review of a decision by referee upon Petition for Reconsideration to the Appeals Board. Consideration has been given to the requirements of due process at that level in decisions by the Supreme Court of California. In Allied Comp. Insurance Company v. IAC (Lintz), 57 Cal.2d 115, 120 (1961) it was stated that the requirements of due process are met if the panel merely achieves "a substantial understanding of the record by any reasonable means, including the use of the referee's summary." A prominent writer in this field states:

> "In other words, in connection with reversal of a decision, a review of the transcript is no longer required reading for the panel, providing the report of the referee fully and fairly sets forth the facts of the case. If it can be shown that such report contains material defects and is inadequate, the review of a transcript to test the accuracy and completeness of the summary is still obligatory."
> 1 Hanna California Law of Employee Injuries and Workmen's Compensation (Second Edition) 5-60.

California Labor Code § 5313 provides for a mandatory summarization of evidence, as follows:

> ". . . Together with the findings, decision, order or award, there shall be served upon all the parties to the proceedings, a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

Title 8, California Administrative Code, Rule 10586 expands upon the contents of the summary of the evidence, and provides inter alia:

> "Section 10586. (a) (3) A fair and unbiased summary of the testimony given by each witness, and any stipulations entered into between the parties; . . ."

Verbatim record of the original hearing is required by California law. California Labor Code § 5708 provides:

> "All hearings and investigations before the Appeals Board or a referee are governed by this division and by the Rules of Practice and Procedure adopted by the Appeals Board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent

phonographic reporter."

Testimony is not normally transcribed, except at the request of the party who may wish it to be. Title 8, California Administrative Code § 10740 provides:

> "Testimony taken at hearings in compensation proceedings ordinarily will not be transcribed, except upon the request of a party accompanied by the statutory fee."

Title 8, California Administrative Code, § 10750 provides:

> "The record of a proceeding shall consist of the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a proceeding, notices, petitioners, briefs, findings, orders, decisions and awards."

Notes of the reporter, transcribed or untranscribed, are kept for a minimum period of six years, with further retention in special circumstances. Title 8, California Administrative Code, § 10762.

From the above provisions it may be seen that petitioner's citation of NLRB v. Southern Transport, Inc., 355 F.2d 978 (1966) is irrelevant to the issue before the court.

III

The existence of an extensive summary of the testimony, which was in this case incorporated as an exhibit to the PETITION FOR WRIT OF REVIEW submitted by petitioner to the Court of Appeal, eliminates any possible prejudice which could

exist to petitioner. In addition, the existence of such summary meets the standard established for criminal proceedings by this court in Griffin v. Illinois, 351 U.S. 12 (1956) and Draper v. Washington, 372 U.S. 487 (1963), both cited by petitioner in his brief. This Honorable Court held in the latter case that a state need not purchase a stenographer's transcript in every case where a criminal defendant cannot buy it. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the event at trial from which the appellant's contentions arise. These alternative methods may include a stipulated statement by the parties, a full narrative statement such as one taken from a trial judge's minutes noted during trial or on the court reporter's own transcript notes, or even by bystanders' bill of exceptions. Moreover, the court indicated the state was not required to furnish parts of the transcript not germane to the issues.

IV

Citations utilized in the PETITION FOR WRIT OF CERTIORARI are largely irrelevant to the issues raised. In passing it may be commented that those matters involving the National Labor Relations Board as a party were directed to standards applicable under the National Labor Relations Act and the Administrative Procedure Act of the United States. Insofar as any of the decisions inferentially bear upon the application of the substantial evidence rule, it is to be noted that the California Supreme Court has enunciated this somewhat differently than petitioner. We find that in Phoenix Indemnity Co. v. IAC, 31 Cal.2d 856 (1948) the holding that findings of the Commission, (now Workmen's Compensation Appeals Board) will not be disturbed upon appeal where they are supported by substantial evidence, or by inferences which may be fairly drawn from the evidence.

Also relevant to this case is the statutory provision that

burden of proof upon the basic issues is upon the applicant (petitioner). California Labor Code §5705.

V

Petitioner seeks certiorari in this decision primarily on the basis that there is no record to review when discretionary judicial review is sought. The authority cited above and the record of the instant case reveals this as contrary to fact. Workmen's Compensation Appeals Board referee hearings have a verbatim record, required by law, and kept in this case. Transcript of this record is available upon timely request, but was not requested in this case by petitioner. Adequate version of testimony is required in a referee's summary, which was kept in this case. No inaccuracy of the referee's summary is suggested by petitioner. The summary of the referee, along with other pertinent exhibits, can be presented to the Court of Appeal upon Petition for Writ of Review at the initiative of counsel, and were in fact presented in this case. The decision of referee complied with the substantial evidence rule. Petitioner has not been prejudiced, and is not procedurally prejudiced under the laws and administrative procedures required in Workmen's Compensation hearings in the State of California. There is no federal question of substance, nor is there a decision by the California Court that is not in accord with the applicable decisions of this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY A. STUTZ

Counsel for Respondent
Hartford Accident &
Indemnity Company